

**THE CASE FOR VA PENSION REFORM: TO  
BETTER SERVE THOSE THAT SERVED, A  
LOOK-BACK PROVISION AND  
ADDITIONAL IMPROVEMENTS ARE  
NEEDED**

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*The Department of Veterans Affairs Pension and Aid and Attendance Programs provide financial assistance and long-term care to elder veterans. The programs in their current states contain exploits that allow applicants to challenge the programs' integrity. In this Note, the author discusses the history of the VA Pension and Aid and Attendance programs. The author explores various problems associated with the current application and verification processes, and discusses other aid programs that implement tools which may strengthen the integrity of the VA Pension and Aid and Attendance programs. Lastly, the author suggests statutory and administrative tools which may enable the VA to maintain the Pension and Aid and Attendance programs' integrity, in order to ensure their continued existence.*

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## I. Introduction

For serving during a period of war and reaching the age of sixty-five, the Department of Veterans Affairs (VA) offers low-income elders and their survivors a pension based on qualifying military service.<sup>1</sup> In combination with a non-age-based, disability pension dependent on total disability and service during a period of war, the VA implements a means test to calculate an applicant's net worth in determining whether the claimant is eligible.<sup>2</sup> While the means test assesses a veteran or his survivors' net worth at the time of applying, it does not provide for a look-back provision to discover assets transferred below fair-market value.<sup>3</sup> The lack of a look-back provision has spurred an industry dedicated to restructuring and hiding assets, transferring them into other investment vehicles in order to make the claimant appear in need of the pension program.<sup>4</sup>

Although the practice is legal, it has caused alarm as veterans and their survivors who are not in financial need are able to obtain a need-based pension; representatives of veterans and survivors are prohibited from receiving compensation in connection with the filing of a claim,<sup>5</sup> but such representatives are devising unique ways to receive compensation that skirt or violate the law.<sup>6</sup> Because of such transfers, while claimants are left eligible for VA Pensions and other benefits, they are left ineligible for other welfare programs which have existing look-back provisions, such as Supplemental Security Income (SSI) or Medicaid.<sup>7</sup> Legislation has been proposed by both chambers of Congress to remedy the lack of a look-back provision. Nevertheless,

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1. See 38 U.S.C. § 1513 (2012).

2. See 38 U.S.C. §§ 1521–1522 (2012).

3. See 38 U.S.C. § 1522 (2012).

4. *Pension Poachers: Preventing Fraud and Protecting America's Veterans: Hearing Before the S. Special Comm. on Aging*, 112th Cong. 1 (2012) [hereinafter *Pension Poachers*] (statement of Herb Khol, Chairman, S. Special Comm. on Aging).

5. See 38 U.S.C. §§ 5901–5904 (2012).

6. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-540, VETERANS' PENSION BENEFITS: IMPROVEMENTS NEEDED TO ENSURE ONLY QUALIFIED VETERANS AND SURVIVORS RECEIVE BENEFITS 22 (2012), available at <http://www.gao.gov/assets/600/590847.pdf> [hereinafter VETERANS' PENSION IMPROVEMENTS NEEDED].

7. *Id.* at 19.

there remain weaknesses in the program that are not being addressed.<sup>8</sup>

This Note addresses remedying the gap in the VA Pension program by first detailing in Part II the background of the VA Pension and Aid and Attendance programs. The overview will provide groundwork for the legislative response to the current abuses of the system and veterans. In Part III, a comparison of the current VA Pension needs-based analysis will be made against other federal welfare systems to determine strengths and weaknesses of implementing different income-verification systems. In particular, this Note will discuss whether proposed legislation for a look-back provision is sufficient to ensure a pension system exists for veterans and their survivors in need. Finally, this Note will conclude that the current legislation, while a step in the right direction, is insufficient to ensure the need-based pension system endures for elder veterans and their survivors. In Part IV, this Note will also call for recommendations of improved forms for claims processing, ongoing and thorough income-verification systems, and vigilance towards veterans and organizations that seek to defraud the VA.

## II. Background and History

### A. Early Pension Laws and the Birth of Veterans Affairs

The tradition of care for veterans preceded the birth of the United States, tracing its roots to the pension system created by this nation's first set of laws—the compact, charter, and laws of the New Plymouth Colony.<sup>9</sup> In 1636, the Plymouth Colony, in light of conflict with the Native Americans, enacted law providing should any troop deployed by the Governor “returne maymed & hurt” he shall be “mayntayned competently by the colony duringe his life.”<sup>10</sup> Future colonies followed the New Plymouth Colony example.<sup>11</sup>

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8. H.R. 6171, 112th Cong. (2012); S. 3270, 112th Cong. (2012).

9. WILLIAM BRIGHAM, *THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH: TOGETHER WITH THE CHARTER OF THE COUNCIL AT PLYMOUTH, AND AN APPENDIX, CONTAINING THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND, AND OTHER VALUABLE DOCUMENTS* 44 (1836). See also U.S. DEP'T OF VETERANS AFFAIRS, *VA HISTORY IN BRIEF 3* [hereinafter *VA HISTORY IN BRIEF*], available at [http://www.va.gov/opa/publications/archives/docs/history\\_in\\_brief.pdf](http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf).

10. BRIGHAM, *supra* note 9, at 44; *VA HISTORY IN BRIEF supra* note 9, at 3.

11. *VA HISTORY IN BRIEF, supra* note 9, at 3.

Later, at the dawn of America's independence, the Continental Congress of 1776 established the first pension law of this country in order to recruit troops and reduce desertion.<sup>12</sup> In August 1776, Congress enacted that every officer and soldier who lost a limb in an engagement or was disabled in service to the United States, rendering him incapable of later attaining a livelihood, would receive a half month's pay from the time service ends for life or for duration of the disability.<sup>13</sup>

Congress delegated to the states the financing of the pension,<sup>14</sup> which led to a varying degree of benefits distribution to veterans.<sup>15</sup> It was not until the ratification of the U.S. Constitution that the first Continental Congress assumed the responsibility of financing a veterans' pension, choosing to continue payments made by states, at the discretion of the President.<sup>16</sup>

The first pension barred benefits to widows and orphans until 1792, when Congress suspended the bar for the widows and orphans of officers.<sup>17</sup> In 1818, the pension was extended to not only those disabled in the army and navy, but those "by reason of his reduced circumstances in life," granted they were "in need of assistance from his country for support . . ."<sup>18</sup> No longer was the *invalid-pension*, or disability pension, the limit: a need-based, or *service-pension*, was created.<sup>19</sup> It took over 50 years, however, for an extension of this pension to "the widows of all officers, non-commissioned officers, musicians, soldiers, mariners, or marines, and Indian spies . . . who shall have served . . . in the revolutionary war with Great Britain[,] equal to their husbands would they have been living."<sup>20</sup> The creation of the need-based system

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12. *Id.*

13. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 702 (Washington, Gov't Printing Office 1906) [hereinafter Continental Congress].

14. *Id.* at 704.

15. VA HISTORY IN BRIEF, *supra* note 9, at 3.

16. Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, 1 Stat. 95 (1789).

17. Act to Provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established, and to Regulate the Claims to Invalid Pensions, ch. 11, 1 Stat. 243, 244 (1792).

18. Act to Provide for Certain Persons Engaged in the Land and Naval Service of the United States, in the Revolutionary War, ch. 19, 3 Stat. 410 (1818).

19. *Id.* See also WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 2 (1918) (discussing the differences between the invalid or disability pensions granted in light of disability during military service and the service pension granted in gratitude of service alone).

20. Act for the Relief of Certain Surviving Widows of Officers and Soldiers of the Revolutionary Army, ch. 120, 9 Stat. 265-66 (1848).

resulted in an increase of pensioners from 2,200 to 17,730 during 1816–1820, all disbursed by the newly created Bureau of Pensions.<sup>21</sup>

A greater increase to the pension system occurred during the Civil War, where nearly two million veterans were disabled or in need—although the pension system only rewarded Union soldiers.<sup>22</sup> It was during President Abraham Lincoln’s second inaugural address in 1865 that the President called upon Congress “to care for him who shall have borne the battle and for his widow and his orphan”<sup>23</sup>—a call that the current Department of Veterans Affairs adopted as its motto.<sup>24</sup> In 1873, an act was made to consolidate the pension system.<sup>25</sup> There, revisions to the invalid-pension and service-pension were made, extending further benefits to widows and orphans, of both “Indians” and “Coloreds,” but not bastards.<sup>26</sup> It was also through this Act that veterans were able to obtain aid and attendance—benefits to help disabled veterans hire nurses or housekeepers.<sup>27</sup> The Act did not allow a veteran to concurrently receive an invalid-pension and service-pension.<sup>28</sup> Congress followed the consolidation with the National Asylum for Disabled Volunteer Soldiers, later to become the National Home for Disabled Volunteer Soldiers in 1874.<sup>29</sup>

The Dependent Pension Act of 1890 was pivotal in enlarging the scope of veterans’ pension. Until this Act, each pension was limited to a service disability—the Dependent Pension Act extended pension to any veteran who was disabled, regardless of origin.<sup>30</sup> The Dependent Pension Act opened the pension to veterans’ widows and orphans, without regard to the veterans’ death—the death could have been

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21. VA History in Brief *supra* note 9.

22. Not until 1958 was a formal pardon granted to Confederate soldiers and pension benefits extended. *See id.* at 4.

23. Abraham Lincoln, 16th President of the United States of America, Second Inaugural Address on the U.S. Capitol Grounds (Mar. 4, 1865), available at [http://avalon.law.yale.edu/19th\\_century/lincoln2.asp](http://avalon.law.yale.edu/19th_century/lincoln2.asp).

24. U.S. DEP’T OF VETERANS AFFAIRS, *The Origin of the VA Motto: Lincoln’s Second Inaugural Address*, <http://www.va.gov/opa/publications/celebrate/vamotto.pdf>.

25. Act to Revise, Consolidate, and Amend the Laws Relating to Pensions, ch. 234, 17 Stat. 566 (1873).

26. *Id.*

27. *Id.*

28. *Id.*

29. VA HISTORY IN BRIEF, *supra* note 9, at 5.

30. *Id.*

from battle or a peacetime incident.<sup>31</sup> At its height of disbursement in the 1890s, the pension system consumed over half of the federal budget.<sup>32</sup>

This spending from the Dependent Pension Act increased exponentially after Executive Order No. 78 in 1904, which included old age under the Dependent Pension Act's "disability" coverage, and in 1907, with the passage of the Service and Age Pension Law.<sup>33</sup> Under the Service and Age Pension Law, veterans of the Mexican and Civil Wars received pension automatically upon reaching age 62.<sup>34</sup> The pension increased upon reaching certain ages.<sup>35</sup> This increase applied to the veteran, or should he be dead, to his widow and orphans.<sup>36</sup> Ultimately, with the increase in breadth of each of these pension programs, the Bureau of Pensions found itself spending \$2.23 billion with a vast number of recipients being Civil War veterans, their widows, or orphans.<sup>37</sup> With few exceptions, the pensions were paid to rich and poor alike, without difference.<sup>38</sup>

In 1933, President Hoover was authorized by Congress to consolidate all veterans' activities of the Bureau of Pensions, Veterans' Bureau, and the National Homes of Disabled Volunteer Soldiers, to the Veterans' Administration.<sup>39</sup> Finally, in 1988, Congress redesignated the Veterans' Administration to the current Department of Veterans Affairs, assigning it its own executive department and the Secretary cabinet-level status.<sup>40</sup> The Department of Veterans Affairs is

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31. GLASSON, *supra* note 19, at 235. The widow and orphan pension was not without requirements and bars.

32. Peter Blanck & Chen Song, "Never Forget What They Did Here": Civil War Pensions for Gettysburg Union Army Veterans and Disability in Nineteenth-Century America, 44 WM. & MARY L. REV. 1109, 1113 (2003).

33. *Id.* at 1121; see also Act Granting Pensions to Certain Enlisted Men, Soldiers, and Officers who Served in the Civil War and the War with Mexico, ch. 468, 34 Stat. 879 (1907) [hereinafter Service and Pension Law of 1907].

34. Service and Pension Law of 1907, § 1, 34 Stat. at 879.

35. Act to Amend and Act Entitled "An Act Granting Pension to Certain Enlisted Men, Soldiers, and Officers who Served in the Civil War and the War with Mexico," Approved May Eleventh, Nineteen Hundred and Twelve, ch. 96, 40 Stat. 603 (1912).

36. GLASSON, *supra* note 19, at 260.

37. See *id.* at 262.

38. *Id.*

39. Act to Authorize the President to Consolidate and Coordinate Governmental Activities Affecting War Veterans, Pub. L. No. 536, 46 Stat. 1016 (1930).

40. Act to Establish the Veterans' Administration as an Executive Department, and for Other Purposes, Pub. L. No. 100-527, 102 Stat. 2635 (1988).

authorized by Congress to administer veterans' benefits, including pensions.<sup>41</sup>

## B. The Current VA Pension System

There are several age-related pension programs for veterans and their survivors, each requiring the veteran be age 65 or older, have 90 days or more of active-duty service, and have at least 1 day of service during a period of war.<sup>42</sup> These pensions, the Protected Pension, Medal of Honor Pension, and Improved Veterans Pension (Improved Pension), generally have the same requirements.<sup>43</sup> To qualify, the veteran must have been discharged under other than dishonorable conditions and, if he is disabled, he must have been disabled by other than willful misconduct.<sup>44</sup> The purpose of the pension programs is to bring veterans with low incomes to an income level established by Congress.<sup>45</sup> While there are several pension programs, new applicants are placed almost exclusively into the Improved Pension (also known as Basic Pension),<sup>46</sup> with the Aid and Attendant Benefits (Special Monthly Pension) being the only other program pensioners can receive in addition to the Basic Pension.<sup>47</sup> Because about 95 percent of pensioners receive the Basic Pension<sup>48</sup> and/or Aid and Attendant Benefits, this Note will focus on the two.

### 1. THE IMPROVED PENSION PROGRAM

The Improved Pension Program, or as enacted by Congress the "Veterans' and Survivors' Pension Improvement Act of 1978," aimed

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41. See 38 U.S.C. §§ 1101–2414 (2012) (Part II establishes the general benefits administered by VA). Pensions for non-service disability, death, and for service can be found in Chapter Fifteen. 38 U.S.C. §§ 1501–1562 (2012).

42. U. S. DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS DEPENDENTS AND SURVIVORS 44 (2013), available at [http://www.va.gov/opa/publications/benefits\\_book.asp](http://www.va.gov/opa/publications/benefits_book.asp) [hereinafter FEDERAL BENEFITS FOR VETERANS]. A "period of war" is defined as the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War, and the period beginning on the date of any future declaration of war by the Congress and ending on the date prescribed by Presidential proclamation or concurrent resolution of the Congress. 38 U.S.C. § 1501 (4) (2012).

43. FEDERAL BENEFITS FOR VETERANS, *supra* note 42, at 40.

44. See 38 U.S.C. § 1521 (2012); FEDERAL BENEFITS FOR VETERANS, *supra* note 42, at 40.

45. FEDERAL BENEFITS FOR VETERANS, *supra* note 42, at 40.

46. VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 2, n.2.

47. FEDERAL BENEFITS FOR VETERANS, *supra* note 42, at 41.

48. VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 2, n.2.

to improve the pre-existing pension program by providing increased rates for veterans with non-service-connected disabilities.<sup>49</sup> For certain surviving spouses and children of the veteran, that rate automatically adjusted to annual cost-of-living rates.<sup>50</sup> The rates of increased benefits and income limitations were pegged to increases of benefits and income limitations found under the Social Security Act.<sup>51</sup> In order to verify net worth, the Improved Pension called for proof of income of the corpus of the veteran, spouse, or child receiving pension.<sup>52</sup> The Act allowed any pensioner under the Veterans' Pension Act of 1959 to continue under that pension plan.<sup>53</sup>

As it currently stands, the Improved Pension Act continues to offer pension to veterans over 65 years of age who served active duty:

- 1) for ninety days or more during a period of war; (2) during a period of war and was discharged or released from such service for a service-connected disability; (3) for a period of ninety consecutive days or more and such period began or ended during a period of war; or (4) for an aggregate of ninety days or more in two or more separate periods of service during more than one period of war.<sup>54</sup>

The requirements of the Improved Pension Program are found in 38 U.S.C.A. § 1521, which detail the pension for veterans of a period of war.<sup>55</sup> Under § 1521, a separate, non-age requirement is created under the Improved Pension Program based solely on permanent or total disabilities that are non-service connected and non-willful, while § 1513 benefits those age 65 and older without the requirement of disability.<sup>56</sup> The pension offers various annual rates depending upon whether the veteran is married, has children, or is in need of aid and attendance.<sup>57</sup> Further, special provisions are provided for should two veterans be married.<sup>58</sup>

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49. Service connection "means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein." 38 C.F.R. § 3.303(a) (2013).

50. Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 95-588, 92 Stat. 2497 (1978) (amending Title 38 of the U.S.C. to provide improvements in the pension program) (codified as amended in scattered sections of 38 U.S.C.).

51. *Id.* at § 305.

52. *Id.* at § 103.

53. *Id.* at § 306.

54. 38 U.S.C. § 1513 (a) (2012); 38 U.S.C. § 1521(j)(1)-(4) (2012).

55. *See* 38 U.S.C. § 1521(j).

56. *Compare* 38 U.S.C. § 1513 with 38 U.S.C. § 1521.

57. *See* 38 U.S.C. § 1521(a)-(d).

58. *See* 38 U.S.C. § 1521(f).



## 2. AID AND ATTENDANT AND HOUSEHOLD BENEFITS

The Aid and Attendance Program offers veterans receiving pension under the Improved Pension additional monetary support, should they require, aid and attendance due to age or infirmity.<sup>59</sup> VA regulation establishes a long list of basic criteria for eligibility of Aid and Attendance, which include “inability of claimant to dress or undress himself . . . or to keep himself ordinarily clean and presentable; frequent need of adjustment of any special prosthetic . . . which by reason of the particular disability cannot be done without aid . . . .”<sup>60</sup> Medically prescribed bed riddance is included.<sup>61</sup> This list is illustrative, but not exclusive, in determining whether a veteran is entitled to Aid and Attendance: “[i]t is only necessary that the evidence establish that the veteran is so helpless as to need regular aid and attendance, not that there be a constant need.”<sup>62</sup> The assistance is to purchase care that must be provided “under the regular supervision of a licensed health-care professional[,]” and may be conducted by a relative so long as the provider is a licensed health-care professional.<sup>63</sup> Any aid or attendance provided by a member of the beneficiary’s household will not prevent or reduce allowance under the program.<sup>64</sup>

Aid and Attendance provides a significant increase to a veteran’s pension. To demonstrate, an unmarried veteran entitled to pension will receive an annual rate of \$11,830, reduced by her income—while an unmarried veteran in need of aid and attendance will receive \$19,736 annually, reduced by her income.<sup>65</sup> If the veteran is married and requires no Aid and Attendance, she will receive \$15,493 annually, plus \$2,020 for any child or family member in excess of one; with Aid and Attendance she will receive \$23,396 with the same added benefit should she have additional family members, with these amounts likewise reduced by income.<sup>66</sup> A recent amendment allows two veterans who are married to one another to obtain \$15,493 annu-

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59. 38 U.S.C. § 1521(d)–(f).

60. 38 C.F.R. § 3.352(a) (2012).

61. *Id.*

62. *Id.*

63. *Id.* § (b)(iii).

64. *Id.* § (c).

65. Compare 38 U.S.C. § 1521(b), with 38 U.S.C. § 1521(d)(1).

66. Compare 38 U.S.C. § 1521(c), with 38 U.S.C. § 1521(d)(2).

ally without Aid and Attendance, and \$32,433 if they both require Aid and Attendance.<sup>67</sup>

3. **INCOME LIMITATIONS AND REPORTING REQUIREMENTS UNDER THE IMPROVED PENSION PROGRAM AND AID AND ATTENDANCE AND HOUSEHOLD BENEFITS**

Being that the Improved Pension and Aid and Attendance programs are need-based, a net-worth limitation is implemented to determine eligibility.<sup>68</sup> Under § 1522, a veteran is ineligible should the corpus of her estate, her and her spouse's if married, and the estate of the veteran's children can be "consumed for the veteran's maintenance."<sup>69</sup> Although not codified, the VA defines "corpus of estate" as "the market value, less mortgages or other encumbrances, of all real and personal property owned by the claimant and/or spouse, except the claimant's single-family dwelling and reasonable personal effects."<sup>70</sup> The remainder of § 1522 applies the same net-worth limitation on pension paid on a child's account.<sup>71</sup>

Income under the net-worth limitation consists of any salary, regular or irregular income, business income, and property—all of which are calculated under a twelve-month annualization period.<sup>72</sup> Compensation for injury or death is considered income; however, "medical, legal or other expenses incident to the injury or death, or incident to the collection or recovery of the amount of the award or settlement, may be deducted."<sup>73</sup> VA rules evaluate net worth by determining whether some part of a claimant's estate should be used for her maintenance, considering income and the following: whether property can be converted to cash at no substantial sacrifice; life expectancy; number of dependents contained in § 3.250(b)(2); and potential rate of depletion, including unusual medical expenses outlined in § 3.272(g) for the claimant and her dependents.<sup>74</sup> While an asset limit

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67. 38 U.S.C. § 1521(f)(2).

68. See 38 U.S.C. § 1522.

69. *Id.* §§ (a)–(b).

70. U.S. DEP'T OF VETERANS AFFAIRS, VA ADJUDICATION PROCEDURE MANUAL M21-1MR, pt. V, subpt. i, ch. 3, 3-A-2 (2005) [hereinafter VA ADJUDICATION PROCEDURE MANUAL].

71. 38 U.S.C. § 1522(b) (2001).

72. See 38 C.F.R. § 3.271(a)–(e) (2012).

73. 38 C.F.R. § 3.271(g) (2012).

74. 38 C.F.R. § 3.275(d) (2012).

is not explicitly stated under the regulation, VA policy has been to calculate whether the applicant's net worth is over \$80,000, and determine if that worth will last a reasonable time to pay for the claimant's expenses.<sup>75</sup>

The VA allows deduction of income under the net-worth limitation.<sup>76</sup> Welfare donations from private or public organizations, maintenance furnished by friends or relatives, VA Pension benefits under 38 U.S.C. Chapter 15, reimbursement for casualty loss, profits from the sale of property, joint accounts and medical expenses, final and educational expenses, and many other exceptions are not counted as either income or deductible in determining net worth.<sup>77</sup>

Per VA regulation, certain transfers of assets and waivers of income are disregarded as reducing income for net-worth calculation purposes under the pension programs.<sup>78</sup> Gifts given to relatives in the same household, sale of property to such relatives with a price "so low as to be tantamount to a gift[.]" and gifts to someone other than a relative in the grantor's household unless clearly a relinquishment of rights of control and ownership, shall not be considered a reduction of income under the net-worth limitation.<sup>79</sup>

The VA requires applicants or recipients of pension to provide, as required, "such information, proofs, and evidence as is necessary to determine the annual income and the value of the corpus of the estate of such person . . ."<sup>80</sup> Eligibility Verification Reports (EVRs) are prescribed by the VA to request information necessary to verify or determine pension eligibility.<sup>81</sup> EVRs are issued at the discretion of the VA to current pensioners and upon application of new claimants.<sup>82</sup> A failure to submit an EVR within 60 days of a request or upon a new application will result in a suspension or denial of pension.<sup>83</sup>

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75. VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 4.

76. 38 C.F.R. § 3.272 (2012).

77. *Id.* The majority of exceptions to the net-income limitation concern congressionally granted remedial efforts. For instance, exceptions exist for veterans receiving income under the Alaska Native Claims Settlement Act, the Radiation Exposure Compensation Act, Victims of Crime Act, Restitution to Individuals of Japanese Ancestry, and others. See 38 C.F.R. § 3.272(k)-(v) (2012).

78. See 38 C.F.R. § 3.276(b) (2013).

79. *Id.* §§ (a)-(b).

80. 38 C.F.R. § 3.277(a).

81. *Id.* § (c).

82. *Id.* § (c)-(d).

83. *Id.*

### C. Statistics of the Pension and Aid and Attendance Programs

The VA Pension system pales in comparison to its disability compensation counterpart.<sup>84</sup> Both the compensation and pension programs are combined under the VA budget, and over \$59 billion was spent on the programs in 2011.<sup>85</sup> While only 515,700 claimed pension in 2011, versus over 3 million disability compensation claimants that same year, the pension programs have seen a combined 8.5 percent increase over the previous year.<sup>86</sup> As of 2011, the VA calculated over 22 million veterans,<sup>87</sup> while U.S. census data from 2000 showing over 9.5 million veterans are aged 65 and above.<sup>88</sup>

The increase in claimants of recent wars supports stricter controls to ensure the pension program remains available. VA Pension enrollment has been declining since 1978, where it saw 2 million claimants, however, there have been increases in pensioners from the Vietnam and Gulf War era.<sup>89</sup> The Government Accounting Office (GAO) attributes the overall decrease to the deaths of WWII veterans, and availability of other welfare programs that raise a claimant's income above the allowable rate.<sup>90</sup> Yet between 2000 and 2006,<sup>91</sup> Gulf War veterans drawing pension increased by nearly 300 percent.

Since 2001, Congress has authorized military engagements in Operation Iraqi Freedom and Operation Enduring Freedom.<sup>92</sup> With

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84. U.S. DEP'T OF VETERANS AFFAIRS, 2011 VA PERFORMANCE AND ACCOUNTABILITY REPORT I-28 (2011) *available at* [http://www.va.gov/budget/docs/report/2011-VAPAR\\_FullWeb.pdf](http://www.va.gov/budget/docs/report/2011-VAPAR_FullWeb.pdf) [hereinafter 2011 VA REPORT].

85. *Id.* at I-31.

86. *Id.* at I-28.

87. U.S. DEP'T OF VETERANS AFFAIRS, GEOGRAPHIC DISTRIBUTION OF VA EXPENDITURES (2011), *available at* [http://www1.va.gov/VETDATA/docs/GDX/GDX\\_FY11.xls](http://www1.va.gov/VETDATA/docs/GDX/GDX_FY11.xls).

88. U.S. CENSUS BUREAU, UNITED STATES SUMMARY 2000: SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS 2 tbl. 2 (2003). At the time of this Note, 2010 Education and Veteran Status was unavailable, however, American Community Survey data shows as of 2007, there are close to nine million veterans aged sixty-five and older. See U.S. CENSUS BUREAU, COMPARISON OF ACS AND ASEC DATA ON VETERAN STATUS AND PERIOD OF MILITARY SERVICE: 2007 tb. 1 (2007), *available at* [http://www.census.gov/hhes/veterans/files/comparison\\_report.pdf](http://www.census.gov/hhes/veterans/files/comparison_report.pdf).

89. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-112, IMPROVED MANAGEMENT WOULD ENHANCE VA'S PENSION PROGRAM 8 (2008) [hereinafter IMPROVED MANAGEMENT VA'S PENSION PROGRAM].

90. *Id.* at 12.

91. *Id.*

92. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1498 (2002); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) ("To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.").

an estimate of almost 300,000 troops deployed in Operation Enduring Freedom and Operation Iraqi Freedom in 2008 alone,<sup>93</sup> the increases of combat troops will yield a rise in potential claimants in the future. The GAO estimates that 5.2 million veterans will reach 65 years or older in 2015, while acknowledging the inability to account for how many of these veterans will qualify for pension.<sup>94</sup> Thus, while the pension program pales in comparison to the VA compensation program, the growing population of war veterans may make the VA Pension program increasingly relevant in years to come.

#### **D. Abuses of the Pension, Aid and Attendance Programs, and Pensioners**

There is a growing industry that targets veteran pension claimants with substantial assets by convincing them to hide assets in order to qualify for VA Pension and Aid and Attendance.<sup>95</sup> At the time of this Note, over 200 organizations throughout the country market their services of transferring or maintaining assets of veterans or survivors who do not qualify for VA Pension or Aid and Attendance.<sup>96</sup> The organizations, attorneys, and financial planners market to veterans (usually elder veterans with questionable capacity) products that promote asset transfers in order to “artificially qualify” for VA Pension benefits.<sup>97</sup> They achieve this by structuring the excess worth of claimants into such vehicles as trusts, annuities, and insurance.<sup>98</sup> Such organizations may be charging veterans prohibited fees for their services.

#### **E. Congressional Action for a Look-back Provision**

Both chambers of Congress have proposed legislation to amend the VA Pension programs to include a look-back provision.<sup>99</sup> These bills, which are almost identical in scheme, require the VA to consider

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93. AMY BELASCO, CONG. RESEARCH SERV., TROOP LEVELS IN THE AFGHAN AND IRAQ WARS, FY2001-FY2012: COST AND OTHER POTENTIAL ISSUES 4 (2009), available at <http://www.fas.org/sgp/crs/natsec/R40682.pdf>.

94. IMPROVED MANAGEMENT VA'S PENSION PROGRAM, *supra* note 89, at 12.

95. *Pension Poachers*, *supra* note 4, at 1 (statement of Herb Khol, Chairman, S. Special Comm. on Aging).

96. VETERANS' PENSION IMPROVEMENT NEEDED, *supra* note 6, at 15.

97. *Pension Poachers*, *supra* note 4, at 3 (statement of Richard Burr, Member, S. Comm. on Veterans' Affairs).

98. VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 15.

99. S. 3270, 112th Cong. (2012); H.R. 6171, 112th Cong. (2012).

resources recently disposed of below fair-market value, in order to make eligibility determinations.<sup>100</sup> The amendments apply to all pensions and benefits found within 38 U.S.C Chapter 15; namely, VA Pensions and Aid and Attendance.<sup>101</sup> Further, pensioners who have been approved and fail on redetermination to meet the net-worth limitation under the new look-back provision shall have their benefits discontinued.<sup>102</sup>

The look-back period proposed by both bills is 36 months, to be applied on the date of pension application.<sup>103</sup> The provision applies to the estates of the veteran, and if married, the spouse's estate; and should there be children that warrant increased pension, their assets are considered.<sup>104</sup> It is the burden of the claimant to show that a transfer below fair-market value has been returned to the transferor, or that an undue hardship will occur should denial or discontinuance be made, in order to avoid an unfavorable determination.<sup>105</sup> These provisions apply to a veteran applying for benefits under 38 U.S.C. Chapter 15, and spouses or children applying themselves.<sup>106</sup>

### III. Analysis

#### A. The Proposed Legislature

##### 1. DETAILS OF S. 3270 AND H.R. 6171

In June 2012, the Senate originated bill S. 3270, proposing amendment to 38 U.S.C. § 1522, the Net Worth Limitation to the Non-Service-Connected Disability Pension.<sup>107</sup> The bill seeks to require the Secretary of VA to consider resources of individuals applying for pension that were recently disposed of for less than fair-market value, in making an eligibility determination for pension and other purposes.<sup>108</sup>

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100. See S. 3270; H.R. 6171.

101. See S. 3270 § 1(a); H.R. 6171 § 2(a).

102. S. 3270 § 1(a)(1)(B); H.R. 6171 § 2(a)(1)(B).

103. See S. 3270 § 1(a)(1)(B); H.R. 6171 § 2(a)(1)(B).

104. See S. 3270 § 1(a)(1)(B); H.R. 6171 § 2(a)(1)(B).

105. See S. 3270 § 1(a)(1)(B); H.R. 6171 § 2(a)(1)(B).

106. The statutory scheme of the bill identifies the provisions of the look back for the veteran himself, then repeats them in application to a spouse, then the children. See S. 3270 § 1(a)(1)(B); H.R. 6171 § 2(a)(1)(B).

107. S. 3270.

108. *Id.*

S. 3270 applies a look-back provision to the entire Improved Pension Program: the elder provision listed in § 1513 and the veterans of a period of war under § 1521.<sup>109</sup> A look-back date of 36 months from the application date is prescribed, and the assets of anyone in the claimant's household are investigated to determine whether they are the corpus of the veteran's estate, and whether the transfer was below fair-market value.<sup>110</sup> The bill also applies after approval of pension, calling for discontinuance of payments for the 36 months from the date of below-market transfer if one were to occur.<sup>111</sup> The look-back provision applies to a veteran making a claim for his children as well, taking into consideration the child's transfers.<sup>112</sup> The Secretary should not deny a claim on account of a child if a good showing is made that assets were transferred back to the transferor, or to deny or discontinue payments that would create an undue hardship determined by the Secretary.<sup>113</sup> The provisions governing spousal and child eligibility mirror those for the veteran.<sup>114</sup>

S. 3270 is proposed to take effect one year after enactment and apply to new and increase pension claims after that date.<sup>115</sup> The bill calls for annual reports on pension applicants and recipients, the number of denials and discontinuances, and any other information the Secretary deems appropriate.<sup>116</sup>

H.R. 6171 was introduced in July 2012.<sup>117</sup> The Act, entitled "Protecting Veterans Pensions Act," mirrors S. 3270 in that it provides for the consideration of assets, "including a transfer of an asset to an annuity, trust, or other financial instrument or investment[.]" that have been disposed of for less than fair-market value.<sup>118</sup> Like S. 3270, the Protecting Veterans Pension Act calls for a period of ineligibility calculated by the cumulative uncompensated value of covered resources disposed of by the claimant, divided by the monthly amount of pension payable without considering the resources, not to exceed 36 months.<sup>119</sup> The bill, like its Senate counterpart, also called for an effec-

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109. 38 U.S.C. § 1521 (2012); 38 U.S.C. § 1513 (2006).

110. S. 3270 § 1 (a)(1)(B).

111. *Id.*

112. *Id.* at § 1(a)(2).

113. *Id.*

114. *Id.* at § 1(b).

115. *Id.* at § 1(1)(1)c (2012).

116. *Id.* at § (d).

117. H.R. § 6171 112th Cong. (2012).

118. Compare H.R. 6171, with S. 3270.

119. See H.R. 6171; S. 3270.

tive date one year after passage, to be applied prospectively, with an annual report by the Secretary to follow.<sup>120</sup>

## 2. DRAWBACKS OF S. 3270 AND H.R. 6171

The bills proposed by both chambers attack the lack of a look-back provision, but that is the extent of reform.<sup>121</sup> The 36 month look-back provision is an improvement from the void which currently exists; however, as discussed later in this section, it pales in comparison to other means-tested programs' look-back provisions.<sup>122</sup> The bills fail to address inefficiencies in the initial claims process, from claims forms failing to require reporting of certain types of income and factors affecting their net worth to multi-agency cooperation in verifying net worth and income. Such enabling statutes would grant the VA the power to have a more detailed picture of an applicant's net worth and income.

Other agencies employ, or are in the process of developing, tools to detect and prevent overspending and abuse.<sup>123</sup> Enabling cross-verification with other agencies that use financial verification tools for means testing could assist the VA in streamlining the verification process.<sup>124</sup> Rather than implementing its own system, "piggy-backing" off of another agency's verification system will reduce federal government and departmental expenditures as well as redundancy, all the while providing the VA with a more holistic picture of an applicant's finances. Further, the lack of an integrity program in the proposed bills and current statutory scheme prohibits the VA from combating abuse and fraud directly. Congress did not provide for a firmer approach to penalizing claimants or their representatives who seek to defraud the VA, as well as those care providers that may exploit the Aid and Attendance benefit.<sup>125</sup>

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120. See H.R. 6171 § 2; S. 3270.

121. S. 3270; H.R. 6171.

122. See generally 42 U.S.C. § 1396P (2012); 120 Stat. 4, for outlines of 60-month look-back provisions in other means-tested programs, such as Medicaid and SSI.

123. For instance, the proposed amendments neither contain provisions that maintain the integrity of the pension program, nor enable the Secretary to utilize the Access to Financial Institutions (AFI) program. See 42 U.S.C. §§ 1396u-6, 1396w (2012) for examples of the Medicaid integrity and asset verification programs.

124. VA does perform some income cross-verification with other government agencies, as discussed in Part III.C, *infra*; however, these investigations are limited in scope and may not provide a clear picture of a claimant's income and net worth. See 38 U.S.C. § 5317-5317(A) (2012).

125. See generally 38 U.S.C. § 5904 (2012) for the current VA benefits law and discipline of agents and attorneys. While 38 U.S.C. § 5904 provides for discipline



Both bills were referred to committee, where they ultimately died at the closing of the 112th Congress.<sup>126</sup> At the time of this Note, no further attempts have been made to reform the pension program.

### B. Spend Down Drawbacks for Claimants and the VA

While financial organizations aiding VA Pension claimants in transferring assets or reducing wealth is contrary to the purpose of providing for aged or disabled veterans in need, it is legal.<sup>127</sup> Asset transfers may allow a claimant to qualify for VA benefits, but there can be devastating effects when other welfare programs, such as Medicaid, are sought.<sup>128</sup> VA Pension provisions deny claimants multiple VA Pensions, however, it does not deny them aid in other forms, such as Supplemental Security Income or Social Security—it simply calculates the aid to determine the claimant's net worth.<sup>129</sup> Adjusting a claimant's apparent net worth through a spend down may allow one to qualify for VA Pension, but it may affect eligibility for other non-VA programs.

To illustrate a spend down in assets for a VA Pension, a veteran with \$200,000 is recommended to place some of her assets in a reserve account, usually a money-market account to provide liquidity for additional expenses, and usually in a child's name.<sup>130</sup> An immediate annuity is also recommended; one with a penalty-free withdrawal is most favorable to the veteran.<sup>131</sup> The claimant wins when his Maximum Annual Pension Rate (MAPR) is below the threshold. The claimant loses, however, when high commissions drive financial planners to lock annuities to returns that will not be realized until af-

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against agents and attorneys of claimants and 38 U.S.C. Chapter 61 provides for penal and forfeiture provisions against those seeking to defraud VA, Title XXXVIII lacks an organization like Medicaid's Integrity Program, which actively seeks out abuse by those who provide care under the Aid and Attendance program.

126. S. 3270, 112th Cong. §1 (2012); H.R. 6171, 112th Cong. §§ 1–2 (2012).

127. See U.S. DEP'T OF VETERANS AFFAIRS, *Veterans Pension*, <http://benefits.va.gov/PENSIONANDFIDUCIARY/pension/vetpen.asp> (last visited March 24, 2014) (stating VA Pension is for those with "little or no income"). See also 38 U.S.C.A. § 1521 (2012) (lacking a provision against the transfer of assets below fair-market value, while including other assets and income under calculated net worth—*expressio unius est exclusio alterius*).

128. *Pension Poachers*, *supra* note 4, at 1 (statement of Herb Khol, Chairman, S. Special Comm. on Aging).

129. See 38 U.S.C. § 1522, (2013).

130. *Pension Poachers*, *supra* note 4, at 19 (statement of Emily Schwarz, President, Veterans Financial, Inc.).

131. *Id.*

ter the claimant is dead.<sup>132</sup> Further, a transfer to a trust or other account will restart the look-back period for Medicaid in the same way a transfer of annuity into a child's name would, causing a family to wait longer to become eligible for Medicaid.<sup>133</sup> The loss can be devastating when a claimant has transferred assets into illiquid financial vehicles and requires medical assistance such as Medicaid: a claimant may be eligible for a VA Pension but will be denied and unable to pay for care through Medicaid.

While the VA Pension and Aid and Attendance programs do not include a look-back provision, it is required for other welfare programs. For instance, Supplemental Security Income requires a determination of the claimant's resources, implementing a provisional look-back period to determine whether assets were transferred below fair-market value.<sup>134</sup> For the veteran who now qualifies for VA Pension or Aid and Attendance, due to transferring assets in order to appear in need, should that pensioner need Supplemental Security Income (SSI), they must now wait for a 36 month period that does not reflect such below-market transfers.<sup>135</sup> Some asset restructuring firms disclose this to VA Pension claimants while others do not.<sup>136</sup>

Some organizations promoting asset transfers are in the practice of targeting elder veterans with ailments such as Alzheimer's and dementia, in order to press upon them financial products by exploiting their vulnerabilities.<sup>137</sup> These same organizations may charge the veterans or their families fees up to \$10,000<sup>138</sup>—fees which are prohibited by VA regulation.<sup>139</sup> Organizations circumvent the law by charg-

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132. *See id.* *See also* VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 19 (reporting on an organization that offered a deferred annuity to an 86-year-old veteran that would not generate returns until after his death).

133. *Pension Poachers*, *supra* note 4, at 15 (statement of Emily Schwarz, President, Veterans Financial, Inc.).

134. *See* 42 U.S.C. § 1382b (c) (2012).

135. *See id.*

136. *See* VETERANS BENEFITS ADVISORS, <http://veteransbenefitadvisors.com/qualifying/> (last visited March 24, 2014) (disclosing "[i]mproper transfers or conversions can disqualify the veteran for a period of time from Medical Assistance (Medicaid) paying for skilled nursing home care in the future.").

137. *Pension Poachers*, *supra* note 4, at 9 (statement of Lori Perkio, Assistant Director, MEB/PEB Coordinator, American Legion).

138. *Id.* at 4 (statement of Sen. Richard Burr, Member, S. Comm. on Veterans' Affairs); VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 20.

139. VA prohibits agents and attorneys from charging a claimant fees or compensation for a claim, and only allows such compensation to be charged after a Notice of Disagreement is filed subsequent to a denial of benefits or the attorney represents the veteran before a court. *See* 38 U.S.C. §§ 5902–5904 (2012).

ing “benefits counselling fees,” requesting that other persons besides the veteran, be charged.<sup>140</sup> Current law protects veterans from dishonest or disreputable conduct by agents and attorneys,<sup>141</sup> however, the VA lacks a proactive measure for seeking and curtailing this abuse, while similar initiatives are found in other welfare programs.<sup>142</sup> For instance, the Medicaid program enables the Secretary to determine whether fraud, waste, or abuse have occurred, or whether funds are expended in a manner not intended under the program.<sup>143</sup> Such a program under the VA Pension and Aid and Attendance, applied to both determining a claimant’s need and his agent’s or attorney’s fitness, will better serve the veteran and protect the program’s integrity.

### C. Pitfalls in the VA Pension Claims and Continuing Verification Process

#### 1. VA PENSION CLAIMS FORMS DO NOT ADEQUATELY PROBE AN APPLICANT’S NET WORTH AND INCOME

To initiate a pension claim, veterans can file a paper or electronic VA Form 21-526.<sup>144</sup> The promptings on Form 21-526 provide the VA with the information required to make eligibility determinations: information ranging from military service, marriage, income, and net worth.<sup>145</sup> Because the pension program is means tested, the income and net-worth portions are particularly relevant. The form requires applicants to disclose all income and assets owned; however, Form 21-526 does not explicitly prompt claimants to report particular types of assets and income.<sup>146</sup>

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140. VETERANS’ PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 21.

141. 38 U.S.C. § 5904(b) discusses suspension of agents and attorneys from representing claimants before the VA.

142. Compare 38 U.S.C. § 5904 (2012) (authorizing the Secretary of VA to suspend agents and attorneys from practicing before the department), with 42 U.S.C. § 1396u-6 (2012) (establishing a program for the Secretary of CMS to promote the integrity of the Medicaid program, by determining whether fraud, waste and abuse has occurred).

143. See *infra* Part D.4 (discussing the Medicaid Integrity Program).

144. While the VA offers a claimant the choice to file on-line or through mail, veterans also have the option of a telephonic system or assistance through a Veteran Service Organization or VA regional hospital. See U. S. DEP’T OF VETERANS AFFAIRS, *Applying for Benefits*, <http://benefits.va.gov/BENEFITS/Applying.asp> (last visited March 24, 2014).

145. U.S. DEP’T OF VETERANS AFFAIRS, VA FORM 21-526: VETERAN’S APPLICATION FOR COMPENSATION AND/OR PENSION (2009) [hereinafter VA C&P APPLICATION].

146. See *id.* at 8.

Part VIII of Form 21-526 asks the applicant to disclose the income of herself, and her spouse and children if applicable, from an exclusive list of sources.<sup>147</sup> The sources are Social Security, U.S. Civil Service, U.S. Railroad Retirement, Military Retired Pay, Black Lung Benefits, and a field for Other—listing interest, dividends, or one-time payments.<sup>148</sup> However, the form fails to prompt claimants whether they receive income from private monthly retirement.<sup>149</sup> VA claims processors have reported delays in pension processing, due to claimants failing to specify the income in the “Other” category, thus requiring follow up.<sup>150</sup> Further, the SSA reported that private pensions made up nine percent of aggregate income for individuals aged 65 and older in 2012.<sup>151</sup> While not a majority source of elder income, private pensions were only two percent less of a source of income than individual assets,<sup>152</sup> raising alarm as to the impact of private pensions going unreported in determining VA Pension eligibility.

Part IX of Form 21-526 prompts the applicant to report their net worth.<sup>153</sup> Like Part VII, this part asks for information from the claimant, and spouse and children if applicable.<sup>154</sup> The following are considered under net worth: cash, non- and interest-bearing bank accounts, CDs, retirement accounts such as IRAs and Keogh Plans, stocks, bonds and mutual funds, business assets, and real property excluding one’s home.<sup>155</sup> What the form lacks is space for a claimant to disclose asset transfers or gifts and while the pension does not consider assets transferred below market value, Form 21-526 explicitly states:

[An applicant] must disclose all financial transactions that involve a transfer of assets, even if the transaction occurred prior to the date of your application for VA Pension. A gift of property or a sale below the property’s value to a relative residing in the same household does not reduce net worth. Likewise, a gift of property to someone other than a relative residing in your household does not reduce net worth unless it is clear that you have relinquished

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147. VA C&P APPLICATION, *supra* note 145, at 8.

148. *Id.*

149. *Id.* See also VETERANS’ PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 8.

150. See *id.* at 8.

151. SOC. SEC. ADMIN., NO. 13-11785, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY 7 (2012).

152. *Id.*

153. VA C&P Application, *supra* note 145, at 8.

154. *Id.*

155. *Id.*

all rights of ownership, including the right to control the property.<sup>156</sup>

Further, the pension application fails to request information regarding annuities and trusts.<sup>157</sup> The GAO reported instances where claimants did not report this information, causing assets valued from \$575,000 to \$612,000 to be unreported.<sup>158</sup> The same report cited a case where \$500,000 was transferred into an irrevocable trust prior to a pension application, only to be discovered when the claims processor inquired into the claimant's medical expenses.<sup>159</sup>

The VA Pension claim forms prompt the veteran to give information that will help the claims processors make an eligibility decision, but what is missing may be crucial in gaining an accurate picture. Better promptings for income and net worth may provide more information for a better eligibility assessment. As it stands, the VA Pension claim form inadequately prompts the claimant to provide information which is required for an eligibility determination. For better protection of VA Pension and Aid and Attendance funds, improvements to these forms are necessary.

## 2. THE VA RELIES HEAVILY ON SELF-REPORTING DURING INITIAL CLAIMS AND CONTINUING EVALUATIONS

In assessing a claimant's eligibility for VA Pension, the VA depends primarily on self-reported information that is not independently verified.<sup>160</sup> After filing a claim, a veteran is not required to submit other financial information, such as bank statements or tax returns, nor is he required to verify deductible expenses that allow some claimants to qualify for pension,<sup>161</sup> contrary to other means-tested programs. While information provided on an initial claim is primarily used for assessing net-worth information, the VA does find it is often necessary to clarify income and net-worth information given by an applicant.<sup>162</sup> Eligibility Verification Reports (EVRs) are provided for

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156. *Id.* at 4. See 38 C.F.R. § 3.276 (2013), (explaining the treatment of transferred property in calculating the corpus of a claimant's estate).

157. VA C&P APPLICATION, *supra* note 145, at 8.

158. Veterans' Pension Improvements Needed, *supra* note 6, at 8–9.

159. *Id.* at 10.

160. *Id.*

161. *Id.*

162. VA ADJUDICATION PROCEDURE MANUAL, *supra* note 70, at pt. V, subpt. i, ch. 3, § B 3.

this purpose,<sup>163</sup> and also used in cases of a running pension award, requiring verification of income and net worth on a yearly basis.<sup>164</sup>

EVRs are used to obtain a veteran's previous year's income and estimate the current year's income.<sup>165</sup> But while an EVR helps to clarify the picture of a veteran's net worth and income by prompting her to provide more specific information, it too depends on self-reporting and does not require the applicant to submit financial verification.<sup>166</sup> The VA will, however, verify if an applicant receives SSA benefits; and to access a limited pay history, the VA employs the Federal Online Query (FOLQ) which offers instant eligibility information when an EVR is used.<sup>167</sup> With the exception for verification of Old Law Pension eligibility, the FOLQ verifies Railroad Retirement Board benefits as countable income as well.<sup>168</sup> Yet while the purpose of the EVR is to provide a clearer picture of a claimant's net worth and income, it too has the similar shortcomings present in the initial claims form itself; for instance, failing to prompt the claimant for private retirement income, asset transfers, trusts, or annuities.<sup>169</sup>

While limited, the VA's verification systems are not without their own shortcomings. In performing work related to running pension awards, Pension Management Centers (PMCs) perform Income Verification Matches (IVM), Social Security Verification Matches, Rail-

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163. *Id.*

164. See LAWRENCE A. FOLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUT SHELL 351 (2010).

165. See *id.* at 351.

166. See U.S. DEP'T OF VETERANS AFFAIRS, IMPROVED PENSION ELIGIBILITY VERIFICATION REPORT (VETERAN WITH NO CHILDREN): VA FORM 21-0516-1 (2012), available at <http://www.vba.va.gov/pubs/forms/VBA-21-0516-1-ARE.pdf>. This form is specific to veterans with a spouse, but no children, while other forms are tailored to veterans with children and spousal/dependent claimants. See also U.S. DEP'T OF VETERANS AFFAIRS, IMPROVED PENSION ELIGIBILITY VERIFICATION REPORT (VETERAN WITH CHILDREN): VA FORM 21-0517-1 (2012), available at <http://www.vba.va.gov/pubs/forms/VBA-21-0517-1-ARE.pdf>.

167. VA ADJUDICATION PROCEDURE MANUAL, *supra* note 70, at pt. III, subpt. iii, ch. 3, § A. The FOLQ is also used by states in determinations of health and income benefits eligibility, and is known in that context as State On-line Query (SOLQ). See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-966, SOCIAL SECURITY ADMINISTRATION'S DATA EXCHANGES SUPPORT CURRENT PROGRAMS, BUT BETTER PLANNING IS NEEDED TO MEET FUTURE DEMANDS 7 (2009).

168. VA ADJUDICATION PROCEDURE MANUAL, *supra* note 70, at pt. III, subpt. iii, ch. 4, 4-19.

169. See Part III.C.1., *supra*, for a discussion on the pitfalls of the VA Pension claims forms. Compare VA C&P Application, *supra* note 145, with U.S. DEP'T OF VETERANS AFFAIRS, IMPROVED PENSION ELIGIBILITY VERIFICATION REPORT (VETERAN WITH NO CHILDREN): VA FORM 21-0516-1 (2012), available at <http://www.vba.va.gov/pubs/forms/VBA-21-0516-1-ARE.pdf>.

road Retirement Verification Matches, and Total Disability Income Provision (TDIP) Review matches.<sup>170</sup> The IVM, for instance, compares income reported by pension recipients with the IRS and SSA income records.<sup>171</sup> This is done to detect whether recipients have unreported income.<sup>172</sup> Yet, there is a lag period of about 15 months between when the pensioner reports income and when the IVM can be conducted.<sup>173</sup>

In 2011, the VA was conducting IVMs from income reported in 2007.

<sup>174</sup> Further, the IVM does not identify revenue generating assets, such as deferred annuities.<sup>175</sup> The GAO identified a case where a beneficiary approved in 2004 with a reported \$900 in net worth had stocks worth more than \$162,000 at the time, which were not identified until 2007—all of which resulted in an overpayment of more than \$18,000 which the VA waived.<sup>176</sup> While verification matches such as IVMs are efforts in the right direction, helping to provide some sort of improved picture of a claimant's net worth, the VA must improve its turnaround time to save veterans from potentially crushing repayments, and to protect the VA's own coffer. Further, increasing the breadth of the verifications to include other assets that are required to be reported but are out of reach of the IVM will protect the same.

Aside from the VA's own limited, independent verifications, the lack of a requirement for supporting documentation has created difficulty for the VA to detect fraud.<sup>177</sup> The GAO reported cases where veterans were advised by third parties to claim expenses the veterans did not incur, and in one instance, a claimant reported monthly caregiver payments to a daughter valued at \$1,700 but stated on the claims form that the caregiving payments were not to his daughter.<sup>178</sup> The GAO also reported a case where an attorney advised a pension claimant to fraudulently report paying his son \$1,000 per month for expenses that were not being provided in order to obtain a higher pension rate.<sup>179</sup> In the same report, the GAO interviewed claims processors who reported accepting self-reported financial information

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170. VA ADJUDICATION PROCEDURE MANUAL, *supra* note 70, at pt. V, subpt. iv, ch. 2, 2-1.

171. *Id.* at pt. X, ch. 9, 9-1.

172. VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 12.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 12.

178. *Id.* at 10.

179. *Id.*

unless questions arose, and if questions did arise, supporting documentation might be requested.<sup>180</sup>

In sum, the heavy dependence on self-reporting is a handicap in protecting the VA from overpayments spurred by fraudulent claimants. While verification tools such as EVRs are employed, the forms, like the initial claims forms themselves, are similarly lacking in accounting for all required income and net worth. Mandatory verification is non-existent, but it is often necessary on behalf of PMCs. Yet, the existing verification tools are inadequate, as delays in matching reported worth and income with actual information from the IRS and SSA result in an average of over a year delay. If push comes to shove, a veteran may be required to pay over a year's worth of pension, leading to possible hardship. The existing tools to prevent overpayments may be better than none, but improvements are needed in the verification stage of VA Pension applications in order to ensure its integrity and to avoid undue hardship to veterans.

#### **D. Eligibility and Control of Medicaid Benefits**

##### **1. BRIEF OVERVIEW OF BENEFITS AND ELIGIBILITY**

Created in 1965 under the Social Security Act, Medicaid is a joint federal and state entitlement venture in which the federal government provides the states with assistance to distribute medical assistance to eligible needy persons.<sup>181</sup> With broad national guidelines, the states determine eligibility and coverage of individuals, which causes varying coverage state by state.<sup>182</sup> However, to be eligible for federal funds, states must cover certain individuals receiving federally assisted income-maintenance payment and other programs.<sup>183</sup> Included under the mandatory Medicaid eligibility groups are SSI and certain Medicare recipients.<sup>184</sup> States have the option to cover other individuals, such as those aged who receive above the mandatory Medicaid coverage but below the federal poverty line, and those aged, blind, or disabled receiving state supplemental security income.<sup>185</sup>

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180. *Id.* at 11.

181. CTRS. FOR MEDICARE & MEDICAID SERVS., BRIEF SUMMARIES OF MEDICARE & MEDICAID: TITLE XVIII AND TITLE XIX OF THE SOCIAL SECURITY ACT 22 (2010) [hereinafter SUMMARIES OF MEDICARE & MEDICAID].

182. *Id.*

183. *Id.*

184. *Id.* at 23.

185. *Id.*



Similar to the Aid and Attendance program, Medicaid provides for those requiring long-term care.<sup>186</sup> Medicaid provides benefits to elders through reimbursement of nursing home costs, and provides home health care for those categorically needy.<sup>187</sup> Also similar to Aid and Attendance is how Medicaid provides services to recipients who live with a relative, friend, or remain at home rather than a nursing home.<sup>188</sup>

## 2. THE CLAIMS PROCESS

Medicaid applicants apply through local offices of state Medicaid agencies, while recipients of SSI generally do not apply separately for Medicaid.<sup>189</sup> While Medicaid is administered by the states and may have additional requirements, generally, applicants are required to have proof of age, citizenship, Social Security number, income and resources, and other government benefits.<sup>190</sup> The most commonly and universally required supporting documents include: documentation of all income from Social Security, pensions, IRA distributions, interest, royalties; documentation of all financial resources for the past five years, both open and closed checking accounts and their statements, savings account statements, money market accounts, CDs, IRAs, mutual funds, stocks, bonds; documentation of a community spouse's expenditures, such as mortgage, food, utilities, and if applicable, documentation of income tax returns for the past five years, evidence of any real property sold or transferred in the past five years, documentation of the value at the time of sale, copy of the deed, and sale documents; documentation of income producing property with accompanying leases or terms, including property related expenses and taxes; documentation of life insurance and annuity policies, including monthly statements for the past five years; copies of trust agreements; statements from banks concerning contents of safety deposit boxes; and any title or registration for an applicant's vehicles or motorcy-

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186. *Long Term Service and Support*, MEDICAID.GOV, <http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Support/Long-Term-Services-and-Support.html> (last visited March 24, 2014).

187. See FOLIK & KAPLAN, *supra* note 164, at 112–13.

188. See 38 C.F.R. §§ 3.351 (c), (d) (2013); FOLIK & KAPLAN, *supra* note 164, at 113.

189. See FOLIK & KAPLAN, *supra* note 164, at 137.

190. *Id.* at 138.

cles.<sup>191</sup> Reading the list alone is daunting, and an applicant may spend quite some time securing the appropriate documentation. Some states may require more documentation in addition to those listed.

As can be inferred from above, federal law imposes upon the states certain treatment of a Medicaid applicant's assets.<sup>192</sup> During the claims process, states are to find individuals or their spouse who have disposed of assets for less than fair-market value within 60 months ineligible for medical assistance.<sup>193</sup> The period of ineligibility runs from the total amount of uncompensated value from assets transferred divided by the average cost to a private patient of a nursing facility service within the applicant's state.<sup>194</sup> Purchases of an annuity are treated as a disposal of an asset for less than fair-market value unless the state is listed as a beneficiary.<sup>195</sup> Below fair-market value transfers are also applied to funds used to purchase a promissory note, loan, mortgage, life estate interest in another's home, unless certain requirements are met.<sup>196</sup>

Other assets are also treated with scrutiny when determining Medicaid eligibility. Trusts and annuities of which the claimant is a beneficiary, for instance, are investigated.<sup>197</sup> Portions of the trust attributable to the claimant are considered assets,<sup>198</sup> and any portion from an irrevocable trust which could be made to the applicant are considered available resources.<sup>199</sup> For annuities and similar instruments, the applicant must allow the state to become the remainder beneficiary by virtue of the provision for medical assistance.<sup>200</sup> Also considered for Medicaid eligibility is substantial home equity in ex-

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191. THE ELDERCARE TEAM, *What do you Need for a Medicaid Application?*, <http://www.eldercareteam.com/public/533.cfm> (last visited Mar. 21, 2013). For an excellent, all in one resource for Medicaid analysis of state applications, documentation requirements, use of data matches to verify applicant's assets, verification with financial institutions and other information collected, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-749, MEDICAID LONG-TERM CARE: INFORMATION OBTAINED BY STATES ABOUT APPLICANTS' ASSETS VARIES AND MAY BE INSUFFICIENT [hereinafter MEDICAID LTC INFORMATION INSUFFICIENT].

192. See 42 U.S.C. § 1396p (2012).

193. See *id.* at § (c)(1)(B)(i).

194. See *id.* at § (c)(1)(E). The statute applies the same ineligibility period for an individual and if married, his spouse. *Id.*

195. See *id.* at § (c)(1)(F).

196. See *id.* at § (c)(1)(I)-(J).

197. 42 U.S.C. § 1396w(d)-(e) (2012). See also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-749, MEDICAID LONG-TERM CARE: INFORMATION OBTAINED BY STATES ABOUT APPLICANTS' ASSETS VARIES AND MAY BE INSUFFICIENT 8 (2012).

198. 42 U.S.C. § 1396p(d)(2)(B) (2012).

199. *Id.* at § (d)(3)(B).

200. *Id.* at § (e)(1).

cess of \$500,000, which could lead an individual seeking long-term care assistance to a denial.<sup>201</sup> Entrance fees for continuing care retirement or life care communities are considered available resources if they can be used to pay for other care, can be refunded when the individual dies or leaves the community,<sup>202</sup> and if the fee does not confer ownership interest in the community.

While the supporting documentation required for the Medicaid claims process may be long, such information gives claims processors an excellent picture of an applicant's income and net worth in order to make an accurate eligibility determination. The details in the treatment of assets for Medicaid are lengthy, and required provisions that must be attached, for instance, the requirement that the state become a remainder beneficiary in annuities and similar financial instruments,<sup>203</sup> may seem harsh. But to ensure that the means-tested program is used by those who are in actual need and the integrity of the program remains intact, such provisions may be necessary. There may still be loopholes exploited by applicants from the current documentation scheme, yet the required proof and scrutiny of assets are a far cry from the self-reporting relied upon by VA claims processors in determining VA Pension eligibility. The VA Pension system, and enabling statutory authority, may need an overhaul that looks similar to the treatment of assets of the Medicaid program, to better protect the VA Pension integrity. Further, the 36 month look-back provision proposed by Congress for the VA Pension pales in comparison to the 60 months required in Medicaid, and thus should be duplicated.

### 3. VERIFICATION PROGRAMS

In 2008, Congress enacted a requirement that all states implement an asset verification program to determine and re-determine individual eligibility for Medicaid.<sup>204</sup> The plan called for a phase in, ultimately demanding 100 percent state enrollment by the end of fiscal year 2013.<sup>205</sup> The Medicaid asset verification program requires each applicant for medical assistance to provide authorization for the state to obtain from any financial institution the financial records held by

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201. *Id.* at § (f).

202. *Id.* at § (g).

203. *Id.* at § (e)(1).

204. *See* 42 U.S.C. § 1396w (2012).

205. *See id.* at § (a)(3).

that institution relating to the applicant.<sup>206</sup> All authorizations are to remain in effect until an adverse decision, the cessation of the recipient's eligibility for medical assistance, or when expressly revoked by the applicant.<sup>207</sup> If an applicant or recipient of medical assistance refuses to provide or revokes an authorization, the state on such basis may determine the applicant or recipient ineligible for aid.<sup>208</sup> The states are free to contract this program to a public or private entity, so long as it meets certain criteria under the Medicaid program.<sup>209</sup> While there is a mandated phase-in timeline, the GAO reported in 2012 that no state has implemented an asset verification system that could contact multiple financial institutions, including those not listed by the applicant, to verify the existence of open or closed accounts.<sup>210</sup>

Centers for Medicaid and Medicare Services (CMS) has offered guidance to state agencies directing verification requests to be sent to financial institutions that are not identified by the applicant or recipient, based on logic such as geographical proximity or some other related factors.<sup>211</sup> The authorization allows the state to search for both closed and opened accounts, as far back as five years.<sup>212</sup> Because the asset verification program is not centralized, the types of assets and institutions states investigate for eligibility determinations varies from data matches and direct contact with financial institutions, to investigating property and vehicle records.<sup>213</sup>

The verification program is an excellent initiative to not only substantiate accounts which a claimant may report, but also the ones he does not. A search within geographic proximity is a logical tool to help cut down on fraud, as it is reasonable to assume one banks near one's residence. A verification system employed by the VA for pension applications would be a useful tool, but the initial costs for a program may be prohibitive. Further, due to the federal distribution of the pension and the joint nature of the Medicaid system, a "piggy backing" system, where the VA employs the existing Medicaid Verification Program, may not be possible unless agreements are made

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206. *See id.* at § (b)(1)(A).

207. *See id.* at § (c)(1)(3).

208. *See id.* at § (f).

209. *See id.* at § (g).

210. MEDICAID LTC INFORMATION INSUFFICIENT, *supra* note 191, at 15.

211. *Id.* at 9 n.17.

212. *Id.* at 15.

213. *Id.* at 9 n.17.

among the states or an amendment made to the enabling Medicaid legislature for states' programs use by other federal agencies.

#### 4. THE INTEGRITY PROGRAM

Committed to combating fraud, waste, and abuse, CMS enacted the Medicaid Integrity Program pursuant to the Deficit Reduction Act of 2005.<sup>214</sup> The program is the first of its kind: a comprehensive federal program designed to combat abuse in a \$300 billion per year program.<sup>215</sup> The Secretary is authorized to enter into contracts with entities to review actions of individuals or entities furnishing services or items under the Medicaid program, in order to determine whether fraud or abuse has occurred.<sup>216</sup> The program calls for education and training, as the Secretary deems appropriate, with respect to payment integrity and quality of care.<sup>217</sup> The program is specific to Medicaid providers, rather than focusing on recipients.

The Medicaid Integrity Program requires the Secretary to conduct an annual report identifying the use of funds for the program and the effectiveness of those funds.<sup>218</sup> The most recent report available, for fiscal year 2010, indicates the program identified \$10.7 million in overpayments to providers.<sup>219</sup> In comparison, the program cost over \$80.4 million in 2010.<sup>220</sup> The Secretary concluded the annual report by stating that fiscal year 2010 "marked another notable year of program accomplishments for the MIP."<sup>221</sup>

The Medicaid Integrity Program is a noble effort to curtail abuse within the care provider side of Medicaid. A program designed for the VA Pension, applied to agents and attorneys, and quite possible Aid and Attendance caregivers, may better serve the mission of the VA Pension and protect funds and veterans alike. The initial cost of the program, a steep \$80.4 million in 2010 alone, followed by only \$10.7 million in overpayments,<sup>222</sup> makes the program seem ineffective

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214. *Medicaid Integrity Program: General Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., <http://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/MedicaidIntegrityProgram/index.html> (last visited March 24, 2014).

215. *Id.*

216. 42 U.S.C. § 1396u-6(a)-(b) (2013).

217. *Id.* at § (b)(3).

218. *Id.* at § (e)(5).

219. CTRS. FOR PROGRAM INTEGRITY & CTRS. FOR MEDICARE & MEDICAID SERVS., ANNUAL REPORT TO CONGRESS ON THE MEDICAID INTEGRITY PROGRAM 3 (2011).

220. *Id.* at 8.

221. *Id.* at 27.

222. *Id.* at 3, 8.

at first glance. However, the \$80.4 million pays for the initial costs of the program and its continued existence. Time will tell whether the program will recoup more than spent, and it is questionable whether such a program applied to the VA Pension can be justified with the current federal budget; yet such a measure will better secure VA Pensions and Aid and Attendance for future veterans.

##### 5. SUCCESS AND AREAS OF IMPROVEMENT

A 2012 GAO report stated that in 2010, nearly half of the nation's long-term care expenditures, roughly \$263 billion, were paid by Medicaid, which equaled roughly one quarter of the \$401 billion spent by the program.<sup>223</sup> The federal government sets requirements for the states in implementing eligibility and verification requirements, yet the federalist framework of the national program poses challenges to the integrity of the program. States vary in whether interviews of applicants should be conducted and whether comprehensive information of assets (stocks, bonds, retirement accounts, checking and savings accounts, etc.) are required during application, or a general application without such information is called for.<sup>224</sup> Some states do not verify applicants' data with their unemployment records or other existing databases that show income.<sup>225</sup> Further, most states do not investigate and take additional steps to obtain information from third parties to detect below-market asset transfers.<sup>226</sup> States also vary in requiring applicants to disclose annuity interest and name the state as a remainder beneficiary.<sup>227</sup> Total state compliance of the required federal provisions regarding the treatment of assets needs improvement, but the scrutiny required by statute is a success in providing guidance to the states.

The recent development of the Integrity Program has been deemed notable by the Secretary of CMS,<sup>228</sup> yet time will tell whether the initial costs will be supported by overpayments detected in the long term. The Asset Verification System (AVS) is to be fully implemented by all states by 2013; however, as the GAO notes, currently there are no states that allow assets to be verified electronically by

223. MEDICAID LTC INFORMATION INSUFFICIENT, *supra* note 191, at 1.

224. *Id.* at app. I.

225. *Id.* at app. II.

226. *Id.* at app. VII.

227. *Id.* at app. VIII.

228. CTR. FOR PROGRAM INTEGRITY & CTR. FOR MEDICARE & MEDICAID SERVS. *supra* note 219, at 27.

multiple financial institutions.<sup>229</sup> The creation of the program is a step in the right direction, but actions speak louder than words. If fully implemented, the AVS may hopefully be used by other agencies, such as the VA, when determining need-based eligibility. In sum, the VA and Congress can learn from the programs that CMS has deployed in protecting the integrity of Medicaid, by applying similar systems to better verify pension applications and detect fraud.

## E. Controlling Benefits under Supplemental Security Income

### 1. BRIEF OVERVIEW OF BENEFITS

Like the VA Pension program, SSI provides supplemental security income to means-tested individuals that are either age 65 or older, blind, or disabled.<sup>230</sup> SSI is administered federally by the Social Security Administration (SSA), who pays benefits from the U.S. Treasury general fund.<sup>231</sup> This differs from Social Security benefits, where benefits are drawn from a Social Security Trust by individuals who are insured and have paid into the Social Security system.<sup>232</sup> In most states, recipients of SSI may also receive Medicaid benefits.<sup>233</sup> Both income and net worth are calculated in eligibility.<sup>234</sup>

### 2. ELIGIBILITY

SSI applicants must meet an income and resource test to be eligible for monthly benefits.<sup>235</sup> In 2010, an individual with a net income of above \$8,088 per year or \$674 per month was ineligible, while spouses with a combined income greater than \$12,132 a year or \$1,011 a month are ineligible.<sup>236</sup> Like the VA Pension program, an individual's benefit under SSI is reduced a dollar for each dollar of earned countable income—"anything you receive in cash or in kind that you can use to

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229. MEDICAID LTC INFORMATION INSUFFICIENT, *supra* note 191, at 15.

230. 42 U.S.C. § 1381 (2012) explicitly states this as the purpose of SSI. For an overview of the SSI program, see also SOC. SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME 4–5 (2012), available at <http://www.ssa.gov/ssi/>.

231. SOC. SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME 4 (2012), available at <http://www.ssa.gov/pubs/11000.pdf>.

232. See SOC. SEC. ADMIN., UNDERSTANDING SUPPLEMENTAL SECURITY INCOME (SSI) (2012), available at <http://www.ssa.gov/ssi/text-understanding-ssi.htm>.

233. *Id.*

234. *Id.* at 11.

235. See FOLIK & KAPLAN, *supra* note 164, at 330.

236. *Id.*

meet your needs for food or shelter.”<sup>237</sup> Applicants are ineligible if they have countable resources in excess of \$2,000, or, for couples, an excess of \$3,000.<sup>238</sup> The purpose of this is similar to the VA Pension requirement: an individual’s resources that could be reasonably consumed for a claimant’s maintenance should be considered in determining eligibility.<sup>239</sup> Self-settled trusts are considered available resources, including irrevocable trusts in full, which contain comingling of assets of a spouse or third party to the extent such assets could be distributed to the individual.<sup>240</sup>

Assets transferred for less than fair-market value as far as the previous 36 months from application can cause loss of SSI eligibility.<sup>241</sup> A penalty period, similar to the one proposed in the Protecting Veterans Pension Act, is applied: the value of uncompensated transfers are divided by the total amount of a combined monthly SSI benefit, including any state payments, with the number of months of penalty.<sup>242</sup> Also similar to the Protecting Veterans Pension Act is that the penalty can be waived if the claimant reverses the transfer or the Secretary deems a hardship would occur.<sup>243</sup> While an inheritance is treated as countable income, if it is transferred within the calendar month of receipt, it is not subject to the penalty.<sup>244</sup> Transfers of a home to a child under 21 or blind or disabled, a spouse, a sibling with equity interest who resided in the home for at least a year prior to being institutionalized, or a child who resided there at least two years prior and is institutionalized, are exempt.<sup>245</sup>

### 3. REPORTING AND VERIFICATION OF RESOURCES

Claimants to SSI are required to report their financial resources to SSA upon an initial claim and for continuing eligibility.<sup>246</sup> Recipients with money above the resource limit were identified as the lead-

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237. *Id.* at 330–31.

238. *Id.* at 333.

239. *See* FOLIK & KAPLAN, *supra* note 164, at 333; 38 U.S.C. § 1522, (2001).

240. *See* FOLIK & KAPLAN, *supra* note 164, at 333–34.

241. *Id.* at 337–38.

242. *Id.* at 338. *See also* H.R. 6171, 112th Cong. (2012).

243. *See* Protecting Veterans Pensions Act, H.R. 6171, 112th Cong. (2012); *see also* FOLIK & KAPLAN, *supra* note 164, at 338.

244. *See* FOLIK & KAPLAN, *supra* note 164, at 338.

245. *Id.* at 338–39.

246. *Reducing Improper Payments / Supplemental Security Income (SSI) / Access to Financial Institutions*, SOC. SEC. ADMIN., <http://www.ssa.gov/improperpayments/afi.html> (last visited March 25, 2014).



ing cause for payment errors for SSI.<sup>247</sup> SSA was prompted, due to the drawbacks of self-reporting by applicants and direct follow-up with financial institutions, to develop an alternative practice of verification.

<sup>248</sup> In 2012, the GAO reported that in fiscal year 2011, SSI payments were made to approximately nine million beneficiaries, equaling roughly \$46 billion in benefits.<sup>249</sup> The Access to Financial Institutions (AFI) program was created as an effective way to reduce errors in asset verification for SSI.<sup>250</sup>

Fully implemented in 2011, the AFI program electronically verifies an SSI applicant for account balances by conducting searches of about 96 percent of financial institutions and provides SSA with data on a recipient's financial institution account for redeterminations.<sup>251</sup> AFI is used during initial and periodic determinations, and is required if liquid resources greater than \$750 are reported.<sup>252</sup> For those who report no accounts or less than \$750, claims processors have discretion to conduct an AFI.<sup>253</sup>

SSA also employs the Telephone Wage Reporting (TWR) program.<sup>254</sup> TWR allows SSI recipients to report monthly wages by calling into an automated telephone system.<sup>255</sup> The information obtained through the TWR is automatically inputted directly into SSA's computer system.<sup>256</sup> The TWR is generally not verified during a redetermination and, being based on self-reported data, is vulnerable to overpayments.<sup>257</sup> The program was not designed for those speaking foreign languages, and is unable to process wage information for those with more than one employer.<sup>258</sup>

Penalties for SSI applicants who provide false information can result in benefit suspension from 6 months to up to 24 months for

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247. *See id.*

248. *See id.*

249. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-109, SUPPLEMENTAL SECURITY INCOME: SSA HAS TAKEN STEPS TO PREVENT AND DETECT OVERPAYMENTS, BUT ADDITIONAL ACTIONS SHOULD BE TAKEN TO IMPROVE OVERSIGHT 3, app 1 at 1 (2012) [hereinafter ADDITIONAL ACTIONS TO IMPROVE SSI].

250. *See id.*

251. *Id.* at 19.

252. *Id.* at 20.

253. *Id.* at 20.

254. *Id.* at 3.

255. *Id.*

256. *Id.*

257. *Id.* at 25.

258. *Id.*

subsequent offenses.<sup>259</sup> Applicants must provide detailed information, from statements of income, authorizations for the SSA to verify and investigate information from financial institutions, proof of assets and income, birth certificate or proof of age, and utility bills and receipts to prove living arrangements.<sup>260</sup> Beneficiaries must report changes to income when they occur, no later than ten days before the close of the month, or a penalty may be imposed.<sup>261</sup>

The AFI appears to be a useful and effective program, while the TWR seems to have shortcomings. Although recipients can verify wages through other means than the TWR, the inability to report wages from multiple employer is a pitfall. Understandably, a telephonic program is limited to the languages employed; yet should SSA issue benefits to individuals of multiple languages, such languages should be accompanied.

#### 4. RATE OF SUCCESS AND PROPOSED IMPROVEMENTS

The SSA estimates that every dollar spent in redeterminations yields approximately six dollars of savings over 10 years, including savings accrued to Medicaid.<sup>262</sup> At the same time, the unreported value of recipient's financial accounts and unreported wages from 2007 through 2011 were detected to account for 37 percent of SSI overpayments, roughly \$1.7 billion, all due to recipients failing to report the existence of accounts or increases in balances.<sup>263</sup> The GAO reported that while SSI utilizes the Access to Financial Institutions (AFI) and Telephone Wage Reporting (TWR) to verify claimant information, the amount of overpayments doubled from \$3.8 billion in 2002 to \$7.6 billion in 2011.<sup>264</sup> But the SSA has reported successes; for instance, in one case an SSI recipient was identified to have six unreported financial institution accounts that each contained nearly \$25,000, while the individual reported having only one that was under the resource limit.<sup>265</sup> SSA projects if the AFI program is used long term, that lifetime SSI program savings would yield \$365 million, or a return on investment of \$9 to \$1, in 2013.<sup>266</sup> It is questionable whether six dollars over

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259. See FOLIK & KAPLAN, *supra* note 164, at 337.

260. See *id.* at 337.

261. 20 C.F.R. §§ 416.708 (c), (d) (2012); 20 C.F.R. § 416.714 (2012).

262. ADDITIONAL ACTIONS TO IMPROVE SSI, *supra* note 249, at 16.

263. *Id.* at 18–19.

264. *Id.* at 13.

265. *Id.* at 19.

266. *Id.* at 20.

10 years is a notable savings to SSI, but a return-on-investment of 9:1 seems enticing to a VA Pension program that could benefit from overpayment protection.

A hamper on reducing SSI overpayments has been the statutory authority for recipients of SSI benefit overpayments to request a waiver of repayment after being notified by the SSA.<sup>267</sup> Because the SSA may grant waivers if the fault is not on the claimant, or to seek repayment would be “against equity and good conscience, or impede the effective or efficient administration of the SSI program because of the small amount of the overpayment involved[.]”<sup>268</sup> the benefits of the SSI’s verification programs may be undermined. Further, the ability of claims representatives to waive overpayments up to \$2,000 without supervisory approval frustrates SSI benefit controls.<sup>269</sup> The waiver, similar to the VA provision enabling the Secretary to waive overpayments, may be considerate; however, attempts should be made to prevent overpayments to the same applicant.

#### IV. Recommendations

Improvements to the VA Pension and Aid and Attendance programs are needed to ensure their integrity and existence. The need for a look-back provision that determines whether assets were transferred below fair-market value, and clearer guidelines on the treatment of assets which are found in other means-tested programs are needed. Improvements to claims and ongoing eligibility forms, followed by the submission of supporting financial documents by claimants, are needed to ensure claims processors have an accurate view of a veteran’s net worth and income, in order to make better eligibility determinations. An integrity program to combat fraud and abuse of the pension and Aid and Attendance programs is recommended. Lastly, initial and ongoing electronic verifications are proposed, utilizing independent or inter-agency financial verification programs, to ensure accurate pensioner information is maintained.

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267. 20 C.F.R. § 416.550 (2012).

268. 42 U.S.C.A. §1383 (b)(1)(B)(i) (2012); *see also* ADDITIONAL ACTIONS TO IMPROVE SSI, *supra* note 249, at 17 (2012).

269. ADDITIONAL ACTIONS TO IMPROVE SSI, *supra* note 249, at 4.

**A. Need for a VA Pension Look-back Provision**

The proposal of a look-back provision by the 112th Congress was a step in the right direction. Creating the provision would put the VA Pension program on par with other means-tested programs, like Medicaid and SSI. Currently, the VA Pension program is open to exploitation by veterans with fraudulent intent and financial organizations promoting asset transfers to appear impoverished for claims processors. Such actions undermine both the funding and intent of the VA Pension program.

With the bills' demise, it is up to the current or future Congresses to enable the Secretary of VA with the power to make considerations of asset transfers in eligibility determinations. With a mandatory look-back provision, the VA will no doubt be tasked with employing more resources to determine whether veterans claiming pension are truly in need, such as doing more investigative work into net worth and income or discovering undisclosed accounts and asset transfers. However, the VA may be able to use existing or developing programs to verify a claimant's assets, preserve federal funding, and reduce redundancy, as discussed in Part IV.E.

**B. Need for Congress to Develop Treatment of Assets for VA Pension**

The current statutory scheme of the VA Pension program pales in comparison to Medicaid program in its treatment of assets. Aside from a brief statute regarding the determination with respect to annual income, a revision closer in line to the Medicaid model is recommended to bring clarity to claims adjusters making VA Pension eligibility decisions. Medicaid, with its statutory detail illustrating provisions of different types of trusts and limits on home equity, for instance, should serve as a model for a VA pension revision at the legislative level. Further, naming the VA as a remainder beneficiary in the case of a pensioner being eligible with a trust, should be modeled after Medicaid. Creating clearer guidelines at the legislative level for asset treatment will alleviate problems of varying eligibility determinations among the PMCs, whose claim processors are left with making their determinations based on little guidance.

### C. Improvement in VA Pension Claims and Running Awards Forms

VA Pension claims forms require the reporting of certain types of income and assets, yet veterans are not prompted to make such reporting during initial claims and continuing eligibility in EVRs. Modifying Compensation and VA Pension forms for claimants seeking VA Pension or Aid and Attendance, or separating the process and form altogether from the Disability Compensation, will promote a more efficient process. Disability claimants must establish a claim of a service-connected injury, while pension claimants must establish a need for aid, or further, Aid and Attendance.<sup>270</sup> Although the Fiduciary Program administers both programs and utilizes the same claims form, some information for the pension program is irrelevant in a disability compensation claim.<sup>271</sup> While a shift to new forms may produce a burden on the VA, claimants for both disability compensation and pension can apply online.<sup>272</sup> Online application may ease the pain of improving fields in the application process. It is understandable that claimants can apply for both disability compensation and pension services, so at the very least, additional fields for trusts, asset transfers, annuities and private retirements should be provided.<sup>273</sup>

Further, the heavy reliance on self-reported information is unheard of in other means-tested programs and should be abandoned in the VA Pension program. Supporting financial documentation should be required by veterans making initial claims and for their continued eligibility. While additional requirements may increase the time VA Pension awards are granted as well as resources required to make eligibility determination, such documentation may protect pension in-

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270. Compare U.S. DEP'T OF VETERANS AFFAIRS, *Pension*, <http://www.benefits.va.gov/pension/#1> (last visited March 24, 2014) (stating pension eligibility requirements), with U.S. DEP'T OF VETERANS AFFAIRS, *Compensation*, <http://www.benefits.va.gov/compensation> (last visited March 24, 2014) (stating VA disability compensation requirements).

271. See U.S. DEP'T OF VETERANS AFFAIRS, VETERAN'S APPLICATION FOR COMPENSATION AND/OR PENSION: VA FORM 21-526 (2009), available at <http://www.vba.va.gov/pubs/forms/VBA-21-526-ARE.pdf>, to differentiate the compensation requirements and relevant fields to the pension requirements and their respective fields.

272. See EBENEFITS, *e-Benefits: Apply for Veterans Benefits Online (VONAPP)*, [https://www.ebenefits.va.gov/ebenefits-portal/ebenefits.portal?\\_nfpb=true&nfxr=false&\\_pageLabel=Vonapp](https://www.ebenefits.va.gov/ebenefits-portal/ebenefits.portal?_nfpb=true&nfxr=false&_pageLabel=Vonapp) (March 24, 2014).

273. See VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 23.

tegrity and ensure hardships do not occur if veterans are required to repay overpayments.

#### **D. Creation of a VA Pension Integrity Program**

The VA statutory scheme regulates conduct of attorneys representing veteran claimants, determining when they can and cannot be compensated, and also sets forth penalties for fraudulent VA Pension and Aid and Attendance claims, yet the VA lacks an integrity program similar to Medicaid. The size of Medicaid's expenditures may justify its integrity program, and the small size of the VA Pension program may be an argument against an integrity program; however, the potential increase of future pension claimants due to recent wars, followed by the current combined budget of compensation and pension claims, warrants a program to protect the integrity of VA funds. Such a program will seek fraud by claimants, brought about individually or at the direction of third-party organizations, and ensure consequences.

The VA has the discretion to seek return of overpaid benefits to claimants unless "collection would be against equity and good conscience[;]" however, it is not required.<sup>274</sup> Even in cases of fraud, it is up to the agency to press charges against such misrepresentation.<sup>275</sup> While legal action by the VA will expend resources at what can be estimated to be a modest, if any, return, establishing a policy of enforcing the return of benefits overpaid due to fraud will put future claimants with fraudulent intent on notice, thus serving a utilitarian benefit in ensuring claimants in true need (parallel to the intent of the VA Pension and Aid and Attendance program) are served. The established discretion of seeking return of benefits overpaid, not due to fraud or misrepresentation, closer parallels the paternalistic ideology of the VA, should the overpayment be modest. It would be the antithesis of the VA system to seek out the return of overpaid benefits indiscriminately, upon error of the agency itself.

Congress should enable the Secretary of VA with powers to secure the integrity of the VA Pension and Aid and Attendance programs. Enabling the VA with an Integrity Program, to seek out abuse and fraud, may be needed to protect veterans and ensure Aid and Attendance dollars are being spent for the right purposes. Clearer lan-

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274. 38 C.F.R. § 1.962 (2012).

275. See 38 C.F.R. § 1.962(b) (2012).

guage by Congress regarding the treatment of assets will help guide the VA and claims processors in determining eligibility—similar language that is found in the Medicaid program can serve as a foundation.

#### **E. Enable the VA to Utilize Other Federal Agencies' Data Match Programs**

Like proposed measures by other means-tested programs to implement an ongoing, income verification system that coordinates data from the IRS and other banking organizations,<sup>276</sup> it is recommended that the VA implement a similar mechanism to verify a claimant's net worth and income by accessing financial institutions and other existing federal government verification systems to ensure pensioners continue to meet the means-test requirements. Should costs be prohibitive, enabling the VA to access other entitlement programs' verification tools will fill current voids, reduce redundancy among federal programs, and protect the federal budget. Utilization of SSA's AFI and TWR will better protect VA Pension funding.

The GAO report on VA Pension Benefits recommends verification of claimants' assets during the initial claims process,<sup>277</sup> but the lack of ongoing, systematic verification will prevent long-term preservation of pension funds. Implementing a cross-system among federal agencies beyond the initial verification of a claimant's EVR, such as the current SSA Access to Financial Institution program,<sup>278</sup> will give claims processors a clearer picture of a claimant's net worth. While cash and other money spent under-the-table will evade reporting requirements, high-risk claimants should be identified by implementing similar programs as the IRS high-risk, audit triggering system.<sup>279</sup> Doing so will provide an additional safeguard over VA Pension funds.

Ultimately, it is in the hands of Congress to provide for these provisions to ensure the continued existence of a VA Pension and Aid and Attendance program, and their integrity. The VA can provide the small remedies towards claims forms and punishing those seeking to defraud the VA, but major improvements will come from enabling

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276. VETERANS' PENSION IMPROVEMENTS NEEDED, *supra* note 6, at 11.

277. *See id.* at 23.

278. *See id.* at 11.

279. *See generally* Robert W. Wood, *What's Your IRS Audit Risk?*, FORBES (Mar. 17, 2011, 9:43 AM), <http://www.forbes.com/sites/robertwood/2011/03/17/whats-your-irs-audit-risk> (discussing the statistics and triggers of IRS audits).

powers granted by Congress. To better serve those who served, these recommendations should be noted.